United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7249

ORIGINAL

To be argued by
ARTHUR N. SEIFF

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PLS

United States Court of Appeals
FOR THE SECOND CIRCUIT

ANNA R. JOHNSON and ROBERT K. JOHNSON,

Plaintiffs-Appellants,

against

PHILLIP KNAPP,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLEE.

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TABLE OF CONTENTS

Table of Cases

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Preliminary statement.

Plaintiffs appeal from a judgment entered in a medical malpractice action in favor of defendant Dr. Phillip Knapp on the verdict of a jury in favor of said defendant after a trial before Hon. William C. Conner.

Plaintiffs originally sued Dr. Knapp and a Dr. D. Jackson Coleman, alleging in one cause of action in malpractice against both defendants jointly that plaintiff "was carelessly treated by defendants in 1972 and 1973 at Columbia Presbyterian Hospital and at defendants' offices" (635).

During the trial, the trial judge dismissed the complaint as to Dr. Coleman (630, 663) and submitted the case to the jury as to Dr. Knapp (595-600, 604-5). The jury returned a verdict in favor of Dr. Knapp (622-23) and judgment was entered in favor of both defendants (666).

Plaintiffs appealed from that judgment as to both defendants (666a) but later withdrew the appeal as to Dr. Coleman (stipulation and order on file in this court).

Questions involved in this appeal.

The only question plaintiffs raise on this appeal relates to the question of informed consent (ptffs.' brief, pp. 1, 2, 12 *et seq.*, 20 *et seq.*, 32 *et seq.*).

Defendant contends that the judgment should be affirmed because the evidence sustains the verdict and the court's charge to the jury was fair and proper. There also is the fact that (1) plaintiffs initially selected the question with respect to informed consent that was to be tried, and was tried and submitted to the jurry, (2) the case was tried on that question with the acquiescence of plaintiffs, (3) plaintiffs acquiesced in the court's charge submitting that question to the jury, (4) plaintiffs had a full and fair trial, (5) the charge to the jury was in accordance with plaintiffs' wishes at that time and fair, (6) plaintiffs never contended otherwise in the court below, and (7) plaintiffs never asked that court to charge what they now, as an afterthought, claim should have been charged.

Defendant contends that consequently plaintiffs' newfound complaint as to the evidence and the charge to the jury comes with ill grace. Had plaintiffs won on that question, we can be sure they would not now be claiming that the wrong question was tried and charged.

Question not involved in this appeal.

Although plaintiffs do not in this Court claim that Dr. Knapp was guilty of malpractice in operating on Mrs. Johnson, and although plaintiffs now admit that they "tried and failed to show the doctor's [Dr. Knapp's] negligence or substandard practice" (ptffs.' brief, pp. 27-28), despite

this, plaintiffs throughout their brief seek to create an impression that Dr. Knapp was negligent in operating on Mrs. Johnson (for what reason plaintiffs do that, we do not know). Plaintiffs do that by (1) continually referring to a few carefully culled parts of the record (ptff.'s brief, pp. 3, 7, 8, 9, 10, etc.) and (2) ignoring the balance of the record which as a whole completely exonerates Dr. Knapp. There was ample evidence, evidence that plaintiffs make no reference to, that sustains the jury's verdict for the doctor.

Dr. Knapp, a well qualified ophthalmologist, Board certified, affiliated with the Eye Institute of the Columbia Presbyterian Medical Center, a Professor in ophthalmology in the College of Physicians and Surgeons (200-4), and who had performed "many hundreds" of such cataract operations, including operations on one-eyed people and on other surgeons (207, 213-14, 231-32), testified that he had put off operating on Mrs. Knapp for over two years (214-15, 216 *et seq.*, 226, 227, 228, 229), that there finally came a time, in September 1972, when, if there were no operation, in another year plaintiff would have had no useful vision in her right eye (432-33), that if her deteriorated and progressively further deteriorating eyesight were to have a chance to be saved, an operation was needed on both eyes; and that there was no malpractice on his part (214-15, 216, 226, 227, 228, 229, 233-34, 428-29, 430, 431). Dr. Knapp was additionally exonerated of malpractice as regards the operation by the testimony of other well qualified experts (Dr. Yannuzzi—331 *et seq.*, 338-42, 345, 346-47, 350-51, 374-75; Dr. Coleman—468-69, 469-70, 475; Dr. Rizzutti—508-10, 510-11, 529-30). Even plaintiffs' expert witness, Dr. Sears, whose deposition was taken by plaintiffs and was read into the trial minutes, did not fault Dr. Knapp (deposition of Dr. Sears, pp. 66-68).*

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* Although in their Designations of what they would include in their Appendix on Appeal plaintiffs repeatedly stated that they would include the testimony of Dr. Sears, they did not do so. Those Designations and that deposition are on file in the office of the Clerk of this Court.

The evidence.

In arguing that the verdict for defendant should be reversed as to the issue of informed consent, plaintiffs have completely ignored pertinent evidence on which the jury was justified in finding for Dr. Knapp.

In this connection, and before discussing the evidence, it should be noted that it was plaintiffs who persisted in injecting (over defendants' objection) expert medical testimony, by plaintiffs' expert witness, Dr. Plain, in the course of plaintiffs' direct case, as to the medical custom and practice with respect to informed consent (103-5, 110-13).

Plaintiffs adduced testimony by their expert witness, Dr. Plain, that the medical standard was for a doctor to tell his patient what "some of the hazards could be" in surgery (110-13).

In discussing what Dr. Knapp told Mrs. Johnson, plaintiffs gloss over the fact that plaintiffs' attorney himself brought out on his cross-examination of Dr. Knapp that the doctor told Mrs. Johnson that it was major surgery and that she "could lose her eyes" as a result of cataract surgery (296, 299).

> "Q. You knew, for example, that there was a small risk but a definite risk that a person might go blind as a result of cataract surgery?
>
> A. That's correct.
>
> Q. That's something you didn't state to Mrs. Johnson, isn't that true?
>
> A. I said she could lose her eyes.
>
> Q. You said to Mrs. Johnson she could lose her eyes?
>
> A. Yes." (296)

> "Q. Are you stating under oath that you told her that as far as her eyes went, it was major surgery?

A. Absolutely.
Q. And that she could go blind?
A. Yes." (299)

Plaintiffs also gloss over the fact that eminent ophthalmologists refuted plaintiffs' Dr. Plain, that they testified, without objection by plaintiffs, that even if Dr. Knapp had told plaintiff only that there was "better than 90% chance of success" in the operation (implicit in which is the information that there was about 10% chance of failure) and "asked her if she had any questions", as stated at page 8 of plaintiffs' brief, that would have been in accordance with the medical practice and standard with respect to informing a patient prior to surgery, that there is no practice to "enumerate all of the risks of cataract extraction" (Dr. Yannuzzi—352-54; Dr. Coleman—482, 488, 489; Dr. Rizzutti—543-44). Dr. Knapp testified to the same effect (291-92). It is practically impossible for any doctor to tell all the hazards that might result from an operation (354). It also is not always advisable to tell every patient, because it may "totally panic the patient", "totally disrupt her emotional status" (354, 355; cf. 302). It was a matter of medical judgment what to do (354, 355, 387).

Plaintiffs' brief also ignores (1) plaintiff's own testimony that she "knew that it [her cataracts] required an operation"; that she knew and anticipated that she would have to have surgery (48); as well as (2) Dr. Knapp's testimony that plaintiff wanted both eyes operated on in the one hospitalization in order to avoid the time that she would lose from her home and children by two hospitalizations (231, 322-23, 325, 431, 438).

The trial court's charge.

Before charging the jury, the trial court showed to plaintiffs' attorney and to defendant's attorney the court's proposed charge, including the granted requests of the attorneys and the three questions that would be submitted to the jury (545-46), and expressly told the attorneys that the question of implied consent would be charged and, as charged, included in question number 1, which read, "Did Dr. Knapp fail to use the skill and care of an ordinary ophthalmologist at the time and place in question" (546, 604).*

Plaintiffs' attorney stated that he would read them and take his exceptions and make requests to charge "at the appropriate time" (549).

A recess was then taken, to give the attorneys an opportunity to do so, and after the recess plaintiffs' highly knowledgeable and experienced attorney took no exceptions, made no objection, and made no requests (551).

The charge the trial court had shown the attorneys and, following their implicit acquiescence therein, submitted to the jury, included the questions of malpractice or negligence by defendant (1) in connection with the operations (595-9) and (2) that defendant "departed from acceptable medical standards . . . in failing to inform Mrs. Johnson about the hazards" in the operations (599-600). The charge authorized the jury to find against defendant on question 1 on either one of those grounds, i.e. if it found

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* Plaintiffs acknowledge the propriety of this (ptffs.' brief, p. 38):

> "The action based on lack of informed consent is one for negligence in failing to conform to the proper standard. If the doctor fails to meet his due care duty to disclose pertinent information, the action should be pleaded in negligence."

against him either on (1) the operations or on (2) informed consent (599-600):

> "One of the ways in which Dr. Knapp is alleged to have departed from acceptable medical standards was in failing to inform Mrs. Johnson about the hazards involved in the removal of a lens, particularly where both lenses are being removed in a single hospital admission.
>
> "A physician is under a duty to divulge to his patient the risks which singly or in combination, tested by general conditions of reasonable disclosure under all the circumstances, will materially affect the patient's decision whether to proceed with the proposed treatment.
>
> "The patient may always choose between apparent dangers, one attendant upon the surgery, the other resulting from the continuation of an existing condition because of the decision not to undergo surgery.
>
> "However, there is no obligation on the part of a physician to enumerate each and every contingency that may arise during an operation. If you find that Dr. Knapp disclosed the facts and risks which a reasonable ophthalmologist would have disclosed under similar circumstances, then you must return a verdict in favor of Dr. Knapp on this issue.
>
> "If, on the other hand, you find that Dr. Knapp failed to disclose what a reasonable ophthalmologist should have disclosed under the circumstances in order to permit Mrs. Johnson to make an informed choice whether or not to undergo the operation on both eyes during the single hospital admission, then you must return a verdict in favor of the plaintiffs on this issue."

It will be remembered that this was in accordance with the evidence that plaintiffs deliberately injected into the case in their direct examination of their expert witness during their plaintiffs' case (103-5, 110-13) and the evidence defendants introduced in rebuttal without objection by plaintiffs (352-54, 482, 489, 543-44).

At the conclusion of the charge plaintiffs' attorney expressly stated, "No exceptions or requests on the part of the plaintiff, your Honor." (608).

What is more, when defendant's attorney objected to a part of the charge relating to informed consent, plaintiffs' attorney stated that the charge as given, and of which plaintiffs' attorney now complains, was correct (608). The trial court then suggested that there be a clarification of the charge by a further charge and did so (609-10), with plaintiffs' acquiescence (610):

> "I want to clarify my charge in just one respect. I said that a physician is under a duty to divulge to his patient the risks which singly or in combination will materially affect the patient's decision whether to proceed with the proposed operation.
>
> "I think there is an unfortunate suggestion there. I do not mean to suggest that the doctor ought to go into detail and to specify all of the horrible things that might happen as a result of an operation. I think a physician is under a duty to inform the patient about the risks to the extent that the patient can exercise an informed judgment. This does not mean, however, that each of the contingencies must be discussed individually or in detail. You will have to determine what a reasonable opthalmological surgeon would have disclosed to a patient, such as Mrs. Johnson, under comparable conditions.
>
> "In that respect, you should consider the particular patient involved and what the evidence has shown

about Mrs. Johnson and her psychological makeup." (609-10)

During its deliberation the jury asked to have read to it Dr. Knapp's testimony as to what he told plaintiff (612) and the court's last charge on that subject (616). When the court (in the absence of the jury), gave the attorneys their choice of what should be done and said, "But they have only asked for the last charge. I think as a matter of fact that that last explanation is a fairly good summation of what the law is anyway, that they should determine what a reasonable ophthalmological surgeon should have told Mrs. Johnson under the circumstances and determine whether or not he met that standard", plaintiff's attorney agreed (617). The court then referred to fact that "there was no exception to the charge at the time it was given" and said he would do what counsel preferred, whereupon plaintiff's attorney said that he preferred "that it be re-read" and the Court agreed to do so and said that the fair thing would be to supplement it, and plaintiff's attorney did not object (618).

The court reporter then read to the jury Dr. Knapp's testimony (619) and the requested portion of the court's charge (620).

The Court then added, in accordance with the prior agreement of the attorneys:

> "I want to clarify that further, to this extent. I do not mean to suggest that the doctor has got to discuss any specific contingency or possible adverse outcome. You will have to determine what a reasonable ophthalmological surgeon should have disclosed to a patient of the physical and emotional and psychological makeup of Mrs. Johnson, under all of the circumstances that obtain here. You will have to decide whether he did what a reasonable ophthalmologist would have done under the circumstances or whether he failed to do so,

> and you will understand, of course, that with respect to this issue, the plaintiff has the burden of proving that he failed to measure up to the standards of a reasonable opthalmologist under those conditions." (620)

Plaintiffs did not object thereto or take an exception (620-21).

When the jury rendered their verdict for defendant, plaintiffs made no motion to set it aside (622-24). Nor had plaintiffs made a motion for a directed verdict at the close of the case (586-87).

POINT I.

The judgment appealed from should be affirmed because the evidence presented a question of fact for the jury, the jury's verdict is sustained by the evidence, and there was no reversible error in the charge (all of which plaintiffs' attorney explicitly conceded on the trial). Plaintiffs' attorney's participation and acquiescence in the evidence adduced and the charge to the jury precludes them from questioning the same in this Court.

Preliminary statement.

There are several principles of the law applicable to this case, any one of which of itself requires that the judgment should be affirmed.

Regarding the evidence.

In arguing for a reversal plaintiffs (1) discuss and rely on such evidence as they deem favors them, evidence that is refuted by other evidence in the case, and (2) ignore that other evidence, evidence that sustains the jury's verdict for defendant.

It is fundamental that:

(1) it was for the jury to choose what portions of the evidence it accepted, what portions it rejected, and what inferences it drew therefrom; the jury was not required to accept one of the versions and reject the other but was free to consider all the evidence in the case (*Lavender* v. *Kurn*, 327 U.S. 645, 653; *Korte* v. *New York, N.H. & H.R. Co.*, 191 F. 2d 86, 88, cert. den. 342 U.S. 868; *La Guerra* v. *Brasileiro*, 124 F. 2d 553, 554, cert. den. 315 U.S. 824; *Salomone* v. *Yellow Taxi Corp.*, 242 N.Y. 251, 259; *Carroll* v. *Wolfe*, 35 A.D. 2d 842);

(2) both the credibility and accuracy of the witnesses (*Rowe* v. *Pennsylvania Greyhound Lines*, 234 F. 2d 922, 924, cert. den. 351 U.S. 984; *Milkman* v. *Lissak*, 126 F. 2d 204, 205) and the ultimate resolution of any conflict in the evidence was exclusively for the jury, the trier of the facts (*Basham* v. *Pennsylvania R. Co.*, 372 U.S. 699, 700-701; *Lebrecht* v. *Bethlehem Steel Corporation*, 402 F. 2d 585, 589; *Casey* v. *Seas Shipping Co.*, 178 F. 2d 360, 361);

(3) defendant as appellee is entitled to the benefit of the most favorable inferences that may reasonably be drawn from the evidence (*Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F. 2d 1036, 1042; *Ditmars* v. *Renz*, 269 N.Y. 191, 193); and

(4) where conflicting inferences can be drawn from testimony, a question of fact is presented for the jury (*Lavender* v. *Kurn*, 327 U.S. 645, 652-653; *Lebrecht* v. *Bethlehem Steel Corp.*, 402 F. 2d 585, 589; *Ditmars* v. *Renz*, 269 N.Y. 191, 193).

It is noteworthy that plaintiffs never claimed on the trial that there was no question for the jury to determine. The trial court submitted to the jury the question of defendant's liability as an issue of fact to be decided by the

jury and plaintiffs explicitly consented thereto both at a conference prior to the proposed charge and after the charge. Consequently, plaintiffs cannot on this appeal for the first time contest the fact that there was a question of fact which was for the jury to decide as to whether or not defendant was liable (*LiMandri* v. *Brasileiro,* 316 F. 2d 3, 4; see also *Schwartz* v. *S.S. Nassau,* 345 F. 2d 465, 466, cert. den. 382 U.S. 919; *Scott* v. *Central Commercial Company,* 272 F. 2d 781, 782-783, cert. den. 363 U.S. 806; *Matter of Williams* v. *Lincoln Metal Products Co.,* 38 A.D. 2d 1003; *Rogers* v. *Dorchester Associates,* 39 A.D. 2d 878, affd. as to this aspect of the case in 32 N.Y. 2d 553, 563; *Meyers* v. *Grand Union Co.,* 30 A.D. 2d 704).

Plaintiff further conceded on the trial that this case presented a *bona fide* issue of fact for the jury to decide, both (1) by failing to move for a directed verdict (*Scientific Holding Co., Ltd.* v. *Plessey Incorporated,* 510 F. 2d 15, 28; *Nielsen* v. *Charles Kurz & Co.,* 295 F. 2d 692, cert. den. 369 U.S. 876; *Carroll* v. *Hubay,* 272 F. 2d 767, 768; *Holpp* v. *Carafa,* 8 A.D. 2d 617; *Gutin* v. *Frank Mascali & Sons, Inc.,* 11 N.Y. 2d 97, 98; cf. *Behan* v. *Ivanhoe Co.,* 263 App. Div. 963) and (2) by failing to object or except to the court's charge submitting the issue as one of fact for the jury to decide (*Compagnie Nationale Air-France* v. *Port of New York Authority,* 427 F. 2d 951; *Keohane* v. *New York Central R.R.,* 418 F. 2d 478; *John Fabrick Tractor Co.* v. *Lizza & Sons, Inc.,* 208 F. 2d 63, 65; *Brown* v. *Du Frey,* 1 N.Y. 2d 190, 195-6; *Chapman* v. *Thirty-Ninth St. Realty Corp.,* 26 A.D. 2d 806). Similarly, implicit in plaintiffs' failure to move to set the verdict aside is their acknowledgement that the evidence sustains the verdict. Thus, in *Scientific Holding Co., Ltd.* v. *Plessey Incorporated,* 510 F. 2d 15, this Court wrote [per Friendly, J.] at p. 28:

> "Plessey never moved for a directed verdict, for judgment n.o.v., or for a new trial with respect to the

> counterclaim. A contention that there was insufficient evidence to warrant submission to the jury or that the verdict was against the weight of the evidence cannot be raised for the first time on appeal."

In *Nagy* v. *Szoke*, 220 App. Div. 807, the Court's opinion is so short and so directly pertinent to the case at bar that we quote it in full:

> "Judgment affirmed, with costs, on the ground that the parties at the trial fixed the issues to be submitted to the jury, and they were submitted by the court without any objection or exception, and without any motion for a directed verdict. All concur."

It is readily understandable why plaintiffs' knowledgeable and experienced attorney thus conceded on the trial that there was a question of fact for the jury to decide as to informed consent and that the evidence sustains the verdict for defendant.* To avoid unnecessary repetition, we refer this Court to our brief recital of the evidence at pages 4-5, *supra*, which shows why plaintiffs on this appeal have made no Point on this appeal as to the verdict for defendant being against the weight of the evidence. It is because plaintiffs have made no such Point in their brief that we deem it unnecessary to discuss the evidence more fully. In this connection it will also be noted that

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* Regarding plaintiffs' repeated references to defendant's response to the interrogatories, which defendant amplified on the trial (296, 299; see pp. 4-5, *supra*), at the most this raised a question of fact that plaintiffs' attorney fully explored on the trial and that the jury resolved in favor of defendant. It will also be noted that defendant's response was made at a time when plaintiffs' claim under their complaint was limited to alleged negligence on the part of both defendants, jointly, with respect to the treatment, and contained no claim regarding informed consent (635), so that defendant's attention in answering the interrogatories was focused on the treatment to the neglect of a full consideration of the new claim plaintiffs raised on the trial.

there is a firmly established principle that a jury verdict in favor of a defendant should not be set aside unless it "could not have been reached upon any fair interpretation of the evidence" (*Freedman* v. *Coca Cola Bottling Co.*, 26 A.D. 2d 554, affd. 19 N.Y. 2d 756; *Pertofsky* v. *Drucks*, 16 A.D. 2d 690; *Olsen* v. *Chase Manhattan Bank*, 10 A.D. 2d 539, 544, affd. 9 N.Y. 2d 829).

Regarding plaintiffs' newfound claim that the case was tried and the jury was charged on a wrong theory.

Throughout the entire trial, (1) both during plaintiffs' proof and during defendant's proof, and (2) before, during and after the charge to the jury, plaintiffs' attorney explicitly acquiesced in and tried the case on the basis of the theory on which the trial court submitted the case to the jury for its determination (103-5, 110-13, 291-92, 352-54, 482, 488, 489, 543-44, 545-46, 608). At no time did plaintiffs' attorney object or except thereto or ask to have the case submitted to the jury on any other theory, although he was given ample opportunity to do so (545-46, 549, 551, 608, 609-10, 617, 618, 620-21). On the contrary, he expressly stated that he had no exceptions or requests to the charge as given (608, 609-10, 617).

Rule 51 of the Federal Rules of Civil Procedure provides, in pertinent part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The cases are legion that a failure to except to a charge bars a claim of reversible error with respect to the charge (5A Moore's, *Federal Practice*, § 51.45, p. 2507 n. 3).

For example, in *Borkovic* v. *Pennsylvania R.R. Co.*, 180 Fed. Supp. 495, 500, 501, the court held that failure to object or except on the trial is a "fatal omission" and "precluded" the party from raising such an objection "at this late date", citing a number of federal adjudications to that effect.

This is the same rule in the New York State appellate courts, which hold that where (as in the case at bar) there is a failure to object or except on the trial, or to make a request for a further charge, a contention not urged below is not open to an appellant in the appellate court (*Chapman* v. *Thirty-Ninth St. Realty Corp.*, 26 A.D. 2d 806; *James* v. *Tseng*, 37 A.D. 2d 824, 825; *Loomis* v. *City of Binghamton*, 43 A.D. 2d 764, app. dismd. 34 N.Y. 2d 537).

A corollary principle was stated in *Olsen* v. *Chase Manhattan Bank*, 9 N.Y. 2d 829, 831:

> "Under the trial court's instructions, which were not excepted to by plaintiff and thereby constituted the law of the case, it was error to set aside the jury's verdict in favor of defendant bank."

and in *Brown* v. *DuFrey*, 1 N.Y. 2d 190, 195:

> "It is well settled that the charge of the Trial Judge, insofar as it is not excepted to, becomes the 'law of the case', binding upon the parties, even though it be an erroneous statement of the law of this State. [cits.]"

and in *Harrington* v. *Kedem Realty Corp.*, 13 A.D. 2d 1027: "No exception was taken to this portion of the charge and, therefore, even if erroneous, it is binding on both [appellants].", as well as in *Chapman* v. *Thirty-Ninth St. Realty Corp.*, 26 A.D. 2d 806.

See also: *Cohen* v. *Franchard Corp.*, 478 F. 2d 115, cert. den. 414 U.S. 857; *Coons* v. *Washington Mirror Works, Inc.*, 477 F. 2d 864, 866.

The fairness of these principles is apparent. If plaintiffs' attorney deemed the charge improper or inadequate or wanted it to be changed or wanted matter to be deleted from or added to it, it was his duty to call it to the attention of the court for either explanation or correction (*LiMandri* v. *Brasileiro,* 316 F. 2d 3, 4; *Reitano* v. *Dobbs,* 31 A.D. 2d 104, 105, affd. 25 N.Y. 2d 612).

Applicable to the case at bar is the court's decision in *Barreto* v. *Rothenhauser,* 46 A.D. 2d 632, 633, app. dismd. 37 N.Y. 2d 882:

> "It must be emphasized that, at the conclusion of the charge, both sides stated that there were no exceptions and no requests to charge. That was the time for counsel to ask the court for additional statements of the law. . . . It would be rather unfair, at this late stage, to reverse and start this case over again simply because [appellant's] counsel failed to make a proper request."

See also *Brenan* v. *Moore-McCormack Lines, Inc.,* 3 A.D. 2d 1006, where the Court affirmed the judgment on the ground that "appellant failed to take the necessary exceptions and make the necessary requests in order to preserve its right" as to the questions raised on the appeal, although "(a)dequate opportunity was afforded the appellant after the court's charge to the jury to take exceptions and to make requests."

To the same effect, see: *Cohen* v. *Franchard Corp.,* 478 F. 2d 115, cert. den. 414 U.S. 857; *Coons* v. *Washington Mirror Works, Inc.,* 477 F. 2d 864, 866.

So firm are the courts in preventing a party from eating his cake and having it also, that it is the rule that even if a party's attorney has not expressly acquiesced, as plaintiffs' attorney did in the case at bar, even if he merely remained silent, that silence would be sufficient to constitute an

acquiescence in what was done and to bar his raising, as plaintiffs' attorney is attempting to do in the case at bar, a newfound argument (*Cohen* v. *Franchard Corp.*, 478 F. 2d 115, cert. den. 414 U.S. 857; *LiMandri* v. *Brasileiro,* 316 F. 2d 3, 4; *Cullen* v. *Naples,* 31 N.Y. 2d 818, 820).

A corollary principle particularly applicable to the case at bar was stated in *Cullen* v. *Naples,* 31 N.Y. 2d 818, at p. 820:

> "The parties to a lawsuit are free to chart their own course at the trial [cit.] and may fashion the basis upon which a particular controversy will be resolved [cits.]. From the colloquy occurring in open court and placed on the record at the commencement of the trial, it is clear that it was the judgment of the parties that reasonableness was not to be an issue in this litigation. Although it is true that counsel for plaintiffs remained silent during that phase of the colloquy when the court and counsel for the insurer stated that reasonableness was not an issue, he was in a position to object or correct the statements made. His failure to do so must be viewed as a tacit acceptance of the direction that the trial would take."

In *LiMandri* v. *Brasileiro,* 316 F. 2d 3, this Court, in rejecting plaintiff-appellant's claim that the case should have been tried as a martime tort rather than on the theory of ordinary negligence, wrote at p. 4:

> "He [appellant] requested instructions dealing with contributory negligence and he took no exception to the court's charge. *Having had the kind of trial he wanted, and having lost,* LiMandri will not now be heard to claim that he should have had a trial on a different theory which he never mentioned" (italics added).

In *Travelers Insurance Co.* v. *General Accident, Fire & Life Assurance Corp.,* 28 N.Y. 2d 458, 463, the New York Court of Appeals expressly held that "the parties have the power to make the law of their own case".

Cf. *Winter* v. *Leigh-Mannell,* 51 A.D. 2d 1012, wherein the court stated that "the parties had charted their own course of procedure and are now bound by the result".

A fortiori, in the case at bar where (1) plaintiffs were given ample opportunity to object or except to the theory of the trial and the charge submitting that theory to the jury, but (2) not only did they not do so, but, on the contrary, participated in and expressed contentment with, and acquiescence in, the conduct of the trial and the charge, this (1) reflects the fairness of the trial and the charge and plaintiffs' willingness to have the jury decide the case on the evidence and the charge as given and (2) bars plaintiffs from raising those points now.

To sum up: if plaintiffs' attorney felt aggrieved, which he obviously did not, it was his duty to let the trial court know, by objection or exception or, after seeing and subsequently hearing the charge, by making a request for a further or different charge. Not only did he not do so, but, on the contrary, he expressly approved of the charge (608, 609-10). Plaintiffs present, belated claim that the charge was erroneous is contrary to plaintiffs' claim on the trail and should not be considered by this Court (cf. *Ranftle* v. *City Athletic Club,* 20 A.D. 2d 716).

Even if plaintiffs' present claim as to the law to be applied were to be applied, the evidence sustains the verdict for defendant (296, 299) and the charge was proper (599-600).

Regarding the jury's note.

Plaintiffs repeatedly refer to the fact that the jury, after exonerating Dr. Knapp of liability, gratuitously added that "we feel that according to given testimony, Dr. Knapp failed to establish a sound patient-doctor relationship" (ptffs.' brief, pp. 2, 31). It is obvious that the jury's feeling was prompted by plaintiff's testimony that Dr. Knapp "was very abrupt and ushered me out of the office very quickly most of the times" (14, 17, 18), that "He has been very abrupt with me on all occasions" (42).

IN CONCLUSION,

it is respectfully submitted that the judgment for defendant should be affirmed.

Respectfully submitted,

ANTHONY L. SCHIAVETTI,
Attorney for Defendant-Appellee,
Office & P.O. Address,
c/o ARTHUR N. SEIFF,
51 Chambers Street,
New York, New York 10007.
Tel. (212) 732-7590

ARTHUR N. SEIFF,
of counsel.

376—Affidavit of Service by Mail

United States Court of Appeals
for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Anna R. Johnson and Robert K. Johnson

Plaintiffs-Appellants

against

Philip Knapp

Defendant-Appellee

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Arhtur N. Seiff Esq., being duly sworn deposes and says that he is the attorney for the above named Defendant-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 7th. day of October, 1976 he served the within Brief for Defendant-Appellee

upon the attorneys for the parties and at the addresses as specified below

Helen F. Krause
P.O. Box 64
Trumbull Connecticut 06611

by depositing 2 true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 7th. day of October, 1976

Roland W. Johnson

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977